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# In Defense of Dissents

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# In Defense of Dissents

By WILLIAM J. BRENNAN, JR.\*

I am a little afraid that students may find boring the subject that I have chosen for this lecture. But stick with me until I get finished. The subject is, "In Defense of Dissents." In all candor, I ought to confess that one reason I chose that title is that the sixteen opinions I wrote some twenty-seven years ago during my first term on the Court did not include a single dissent. Of my fifty-six opinions last term, forty-two were dissents. Under the circumstances, because the great Judge Tobriner also had a view of dissents that was not much different from mine, I thought I would try to tell you why I think they serve a very important purpose indeed.

It is an enormous pleasure for me to be here today, honoring the life and great works of Mathew Tobriner. Such were his accomplishments that my good friend Judge Skelly Wright, who gave the inaugural Tobriner Lecture here two years ago, began his lecture with a confession. He said that he had not, until recently, fully appreciated the importance of state courts and state judges. Skelly and I have been friends for a great many years, and he knew that I had served on the Supreme Court of New Jersey and thus had some ideas about the value of state judges.

Mathew Tobriner was, as Chief Justice Bird described him three years ago in a moving tribute, an exceptional public servant and a great legal scholar. A full appreciation of his years on the bench is not, of course, what you who knew him so well expect from me today. But I was struck by the fact that the universally laudatory assessments of him are by no means limited to discussions of Justice Tobriner's many noteworthy opinions for the California Supreme Court. The deservedly famous case, for example, of *People v. Dorado*<sup>1</sup> foreshadowed *Miranda v. Arizona*<sup>2</sup> in our Court by holding that the right to counsel in a criminal

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1. 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).
2. 384 U.S. 436 (1966).

proceeding was not dependent upon the accused's request for a lawyer. But nearly every appreciation of Justice Tobriner also praises his fifty-eight dissents, notably *In re Tucker*,<sup>3</sup> defining the due process rights of parolees; and *Swoap v. Superior Court*,<sup>4</sup> which involved the constitutionality of a state statute requiring the adult offspring of a recipient of state aid to reimburse the state for the payments received by the parent; and, finally, the very famous *Bakke v. Regents of the University of California*,<sup>5</sup> in which Justice Tobriner urged the court to distinguish between invidious discrimination and benign racial classifications. Now, why do we care about these dissents? After all, none of them "made" law; they did not ensure that parolees would be treated with a modicum of respect; they did not provide benefits to a needy person or advance the rights of those historically denied equal rights and treatment. The dissents are, however, critical to an understanding of the justice. Just as we judge people by their enemies, as well as their friends, their dislikes as well as their likes, the principles they reject as well as the values they affirmatively maintain, so do we look at judges' dissents, as well as their decisions for the court, as we evaluate judicial careers.

Why do judges dissent? Not many years ago, the writer Joan Didion, a Californian, wrote an elegant essay for the New York Times. The question she addressed, and the title of her essay, was "Why I Write." She said:

Of course I stole the title . . . from George Orwell. One reason I stole it was that I like the sound of the words: *Why I Write*. There you have three short unambiguous words that share a sound, and the sound they share is this:

I  
I  
I

In many ways writing is the act of saying I, of imposing oneself upon other people, of saying *listen to me, see it my way, change your mind*.<sup>6</sup>

No doubt, there are those who believe that judges—and particularly dissenting judges—write to hear themselves say, as it were, I I I. And no doubt, there are also those who believe that judges are, like Joan Didion, primarily engaged in the writing of fiction. I cannot agree with either of those propositions.

Of course, we know why judges write *opinions*. It is through the

3. 5 Cal. 3d 171, 184, 486 P.2d 657, 665, 95 Cal. Rptr. 761, 769 (1971).

4. 10 Cal. 3d 490, 511, 516 P.2d 840, 854, 111 Cal. Rptr. 136, 140 (1973).

5. 18 Cal. 3d 34, 64, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (1976), *aff'd in part & rev'd in part*, 438 U.S. 265 (1978).

6. N.Y. Times, Dec. 5, 1976, § 7 (Book Review), at 2 (emphasis in original).

written word that decisions are communicated, that mandates issue. But why *dissent*? What does a judge, whether a Justice of the Supreme Court of the United States or the Supreme Court of California, hope to accomplish by dissenting? After all, the law is the law, and in our system, whether in the legislature or the judiciary, it is made by those who command the majority. As the distinguished legal philosopher H.L.A. Hart declared, "A supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was 'wrong' has no consequences within the system: no one's rights or duties are thereby altered."<sup>7</sup> In view of this reality, some contend that the dissent is an exercise in futility, or, worse still, a "cloud" on the majority decision that detracts from the legitimacy that the law requires and from the prestige of the institution that issues the law. Learned Hand complained that a dissenting opinion "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."<sup>8</sup> Even Justice Holmes, the Great Dissenter himself, remarked in his first dissent on the Court that dissents are generally "useless" and "undesirable."<sup>9</sup> And more recently, Justice Potter Stewart has labeled dissents "subversive literature." Why, then, does a judge hold out?

Very real tensions sometimes emerge when one confronts a colleague with a dissent. After all, collegiality *is* important; unanimity *does* have value; feelings *must* be respected. I doubt that many judges, however, would try to demean a dissent as did a famous Master of the Rolls in England, presiding on a three-judge panel. After hearing a half hour argument, he turned to his colleague on his right and said, "John, haven't we heard enough of this—surely we must allow this appeal." "Oh no, Chief," said John, "I couldn't possibly vote to do that." "Oh well, John," said the Master of the Rolls, "you're entitled to be mistaken." He then turned to his colleague on the left. "Tom," he said, "surely you agree that this appeal must be allowed." "Oh no, Chief," said Tom, "I emphatically agree with John." "Well then," said the Master of the Rolls, "the appeal will be allowed and you two argue between yourselves who will write the dissent."

It seems that to explain why a dissenter holds out, we should examine some of the many different functions of dissents. Not only are all dissents not created equal, but they are not intended to be so. In other words, to answer "why write," one must first define precisely what it is that is being written. I do not have an exhaustive list, but let me at least

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7. H. HART, *THE CONCEPT OF LAW* 138 (1961).

8. L. HAND, *THE BILL OF RIGHTS* 72 (1958).

9. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904).

suggest some diverse roles that may be served by a dissent. If some of this gives you the impression that I am defending dissents, you are right.

In its most straightforward incarnation, the dissent demonstrates flaws the author perceives in the majority's legal analysis. It is offered as a corrective—in the hope that the Court will mend the error of its ways in a later case. Oliver Cromwell captured the thrust of that type of dissent when he pleaded to the General Assembly of the Church of Scotland in 1650, "Brethren, by the bowels of Christ I beseech you, bethink you that you may be mistaken."<sup>10</sup> But the dissent is often more than just a plea; it safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision. Karl Llewellyn, who was critical of the frequency with which Supreme Court Justices, of all courts, dissented, grudgingly acknowledged the importance of that role, characterizing it as "rid[ing] herd on the majority."<sup>11</sup> At the heart of that function is the critical recognition that vigorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side. In this sense, this function reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas. It is as if the opinions of the Court—both for majority and dissent—were the product of a judicial town meeting.

The dissent is also commonly used to emphasize the limits of a majority decision that sweeps, so far as the dissenters are concerned, unnecessarily broadly—a sort of "damage control" mechanism. Along the same lines, a dissent sometimes is designed to furnish litigants and lower courts with practical guidance—such as ways of distinguishing subsequent cases. It may also hint that the litigant might more fruitfully seek relief in a different forum—such as the state courts. I have done that on occasion. Moreover, in this present era of expanding state court protection of individual liberties,<sup>12</sup> in my view, probably the most important development in constitutional jurisprudence today, dissents from federal courts may increasingly offer state courts legal theories that may be relevant to the interpretation of their own state constitutions.

The most enduring dissents, however, are the ones in which the authors speak, as the writer Alan Barth expressed it, as "Prophets with

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10. L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 103 (1985).

11. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26 (1960).

12. See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

Honor.”<sup>13</sup> These are the dissents that often reveal the perceived congruence between the Constitution and the “evolving standards of decency that mark the progress of a maturing society,”<sup>14</sup> and that seek to sow seeds for future harvest. These are the dissents that soar with passion and ring with rhetoric. These are the dissents that, at their best, straddle the worlds of literature and law.

While it is relatively easy to describe the principal functions of dissents, it is often difficult to classify individual dissents, particularly the great ones, as belonging to one category or another; rather, they operate on several levels simultaneously. For example, the first Justice Harlan’s remarkable dissent in *Plessy v. Ferguson*<sup>15</sup> is at once prophetic and expressive of the Justice’s constitutional vision, and, at the same time, a careful and methodical refutation on the majority’s legal analysis in that case.

In this masterful dissent, the Justice said that “in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind . . . .”<sup>16</sup> Justice Harlan also foretold, with unfortunate accuracy, the consequences of the majority’s position. Said he, the *Plessy* decision would:

not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution . . . .<sup>17</sup>

He addressed, and dismissed as erroneous, the majority’s reliance on precedents. “Those decisions,” he declared:

cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments . . . and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.<sup>18</sup>

Justice Harlan, in that dissent, is the quintessential voice crying in the wilderness. In rejecting the Court’s view that so-called separate but equal facilities did not violate the Constitution, Justice Harlan stood

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13. A. BARTH, *PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT* (1974).

14. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

15. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

16. *Id.* at 559.

17. *Id.* at 560.

18. *Id.* at 563.

alone; not a single other justice joined him. In his appeal to the future, Justice Harlan transcended, without slighting, mechanical legal analysis; he sought to announce fundamental constitutional truths as well. He spoke not only to his peers, but to his society, and, more important, across time to later generations. He was, in this sense, a secular prophet, and we continue, long after *Plessy* and long even after *Brown v. Board of Education*,<sup>19</sup> to benefit from his wisdom and courage.

From what source did Justice Harlan derive the right to stand against the collective judgment of his brethren in *Plessy*? We may ask the same question of Justice Holmes in *Abrams*;<sup>20</sup> of Justice Brandeis in *Olmstead*;<sup>21</sup> of Justice Stone in *Gobitis*;<sup>22</sup> of Justice Jackson in *Korematsu*;<sup>23</sup> of Justice Black in *Adamson*;<sup>24</sup> or of the second Justice Harlan in *Poe v. Ullman*;<sup>25</sup> to name but a few of the most famous and powerful dissents of this century. And surely, you may ask the same question of me. How do I justify adhering to my essentially immutable positions on obscenity, the death penalty, the proper test for double jeopardy, and on the eleventh amendment? For me, the answer resides in the nature of the Supreme Court's role.

The Court is something of a paradox—it is at once the whole and its constituent parts. The very words “the Court” mean simultaneously the entity and its members. Generally, critics of dissent advocate the primacy of the unit over its members and argue that the Court is most “legitimate,” most true to its intended role, when it speaks with a single voice. Individual justices are urged to yield their views to the paramount need for unity. It is true that unanimity underscores the gravity of a constitutional imperative—witness *Brown v. Board of Education*<sup>26</sup> and *Cooper v. Aaron*.<sup>27</sup> But, unanimity is not in itself a judicial virtue.

Indeed, history shows that nearly absolute unanimity enjoyed only a brief period of preeminence in the Supreme Court. Until John Marshall became Chief Justice, the Court followed the custom of the King's Bench and announced its decisions through the seriatim opinions of its members.<sup>28</sup> Chief Justice Marshall broke with the English tradition and

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19. 347 U.S. 483 (1954).

20. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

21. *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

22. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 601 (1940) (Stone, J., dissenting).

23. *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

24. *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

25. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

26. 347 U.S. 483 (1954).

27. 358 U.S. 1 (1958).

28. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 192 (1959). The old English practice of issuing seriatim opinions

adopted the practice of announcing judgments of the Court in a single opinion.<sup>29</sup> At first, these opinions were always delivered by Chief Justice Marshall himself, and were virtually always unanimous. Unanimity was consciously pursued and disagreements were deliberately kept private. Indeed, Marshall delivered a number of opinions which, not only did he not write, but which were contrary to his own judgment and vote at conference.<sup>30</sup>

This new practice, however, was of great symbolic and practical significance at the time. Remember the context of the times when the practice was introduced. As one commentator has observed, when Marshall delivered the opinion of the Court, "[h]e did not propose to announce only the views of John Marshall, Federalist of Virginia." Rather, "he intended that the words he wrote should bear the imprimatur of the Supreme Court of the United States. For the first time, the Court as a judicial unit had been committed to an opinion—a ratio decidendi—in support of its judgments."<sup>31</sup> This change in custom at the time consolidated the authority of the Court and aided in the general recognition of the Third Branch as co-equal partner with the other branches. Not surprisingly, not everyone was pleased with the new practice. Thomas Jefferson, who also was a lawyer, was, of course, conversant with the English custom, and was angrily trenchant in his criticism. He wrote that "[a]n opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning."<sup>32</sup> In other words, Marshall had shut down the marketplace of ideas.

Of course, Jefferson was overstating matters a bit. In fact, unanim-

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by each judge has also had some modern supporters. Justice Frankfurter, in one of his first opinions upon joining the Court in 1939, explained in a concurring opinion that:

I join in the Court's opinion but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court.

Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 487 (1939) (Frankfurter, J., concurring) (footnote omitted).

29. ZoBell, *supra* note 28, at 193.

30. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 648 n.24 (1982); Roper, *Judicial Unanimity and the Marshall Court—A Road to Reappraisal*, 9 AM. J. LEGAL HIST. 118, 119 (1965); ZoBell, *supra* note 28, at 193 n.41.

31. ZoBell, *supra* note 28, at 193 (footnote omitted).

32. Letter from John Marshall to Thomas Ritchie (Dec. 25, 1820), *quoted in* ZoBell, *supra* note 28, at 194.



ity remained the rule only for the first four years of Marshall's Chief Justiceship, and during that period only one, one-sentence concurrence was delivered, and that by Justice Chase.<sup>33</sup> But, in 1804 Justice William Johnson arrived on the Court from the state appellate court of South Carolina. He tried to perpetuate the *seriatim* practice of his state court and issued a substantial concurrence in one of the first cases in which he participated. And his colleagues were stunned. Johnson later described their reaction in a letter to Jefferson. "Some Case soon occurred," he wrote:

in which I differed from my Brethren, and I felt it a thing of Course to deliver my Opinion. But, during the rest of the Session I heard nothing but lectures on the Indecency of Judges cutting at each other, and the Loss of Reputation which the Virginia appellate Court had sustained by pursuing such a Course.<sup>34</sup>

Nonetheless, the short-lived tradition of unanimity had been broken, and, in 1806, Justice Paterson delivered the first true dissent from a judgment and opinion of the Court in *Simms v. Slacum*.<sup>35</sup> As one historian has observed, considerably understating the case, since that time "dissents were never again a rarity."<sup>36</sup> Even Chief Justice Marshall filed nine dissents from the opinions of the Court during his closing years on the Bench.<sup>37</sup>

What, then, should we make of modern critics of dissents? Charles Evans Hughes answered that question sixty years ago and I think what he said then is as true today. He said:

When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time [the case is announced]. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.<sup>38</sup>

In Chief Justice Hughes' view, and in my own, justices do have an

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33. ZoBell, *supra* note 28, at 194.

34. Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), *quoted in* ZoBell, *supra* note 28, at 195.

35. 7 U.S. (3 Cranch) 300, 309 (1806) (Paterson, J., dissenting).

36. ZoBell, *supra* note 28, at 196.

37. *Id.*

38. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 67-68 (1928).

obligation to bring their individual intellects to bear on the issues that come before the Court. This does not mean that a justice has an absolute duty to publish trivial disagreements with the majority. Dissent for its own sake has no value, and can threaten the collegiality of the bench. However, where significant and deeply held disagreement exists, members of the Court have a responsibility to articulate it. This is why, when I dissent, I always say why I am doing so. Simply to say, "I dissent," I will not do.

I elevate this responsibility to an obligation because in our legal system judges have no power to *declare* law. That is to say, a court may not simply announce, without more, that it has adopted a rule to which all must adhere. That, of course, is the province of the legislature. Courts *derive* legal principles, and have a duty to explain *why* and *how* a given rule has come to be. This requirement serves a function within the judicial process similar to that served by the electoral process with regard to the political branches of government. It restrains judges and keeps them accountable to the law and to the principles that are the source of judicial authority. The integrity of the process through which a rule is forged and fashioned is as important as the result itself; if it were not, the legitimacy of the rule would be doubtful. Dissents contribute to the integrity of the process, not only by directing attention to perceived difficulties with the majority's opinion, but, to turn one more time to metaphor, also by contributing to the marketplace of competing ideas.

This is not to say that stare decisis is of little consequence. As Justice Roberts noted in *Smith v. Allwright*,<sup>39</sup> constitutional adjudication is not in "the same class as a restricted railroad ticket, good for this day and train only."<sup>40</sup> An opinion of the Court does, and should, carry considerable weight in subsequent cases. But stare decisis merely provides the background for judicial development of the law. As Chief Justice Taney observed, the authority of the Court's construction of the Constitution ultimately "depend[s] altogether on the force of the reasoning by which it is supported."<sup>41</sup> A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority's reasoning can continue to be evaluated, and perhaps, in time, superseded. This supersession may take only three years, as it did when the Court overruled *Gobitis*<sup>42</sup> in *Barnette*;<sup>43</sup> it may take twenty years, as

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39. 321 U.S. 649 (1944) (Roberts, J., dissenting).

40. *Id.* at 669.

41. *Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849).

42. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

it did when the Court overruled *Hammer v. Dagenhart*<sup>44</sup> in *Darby*;<sup>45</sup> it may take sixty years as it did when we overruled *Plessy* in *Brown*. The time periods in which dissents ripen into majority opinions depend on societal developments and the foresight of individual justices, and thus vary. Most dissents never "ripen" and do not deserve to. But it is not the hope of eventual adoption by a majority that alone justifies dissent. For simply by infusing different ideas and methods of analysis into judicial decision-making, dissents prevent that process from becoming rigid or stale. And, each time the Court revisits an issue, the justices are forced by a dissent to reconsider the fundamental questions and to re-think the result.

I must add a word about a special kind of dissent: the repeated dissent in which a justice refuses to yield to the views of the majority although persistently rebuffed by them. For example, Justice Holmes adhered through the years to his views about the evils of substantive due process, as did Justices Black and Douglas to their views regarding the absolute command of the first amendment. And as I said earlier, I adhere to positions on the issues of capital punishment, the eleventh amendment, and obscenity, which I developed over many years and after much troubling thought. On the death penalty, for example, as I interpret the eighth amendment, its prohibition against cruel and unusual punishments embodies to a unique degree moral principles that substantively restrain the punishments governments of our civilized society may impose on those convicted of capital offenses. Foremost among the moral principles inherent in the constitutional prohibition is the primary principle that the state, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. For, as Justice Tobriner too believed, all legal decisions should advance, not degrade, human dignity. Death for whatever crime and under all circumstances is a truly awesome thing. The calculated killing of a human being by the state involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the state from constitutional restraints on the destruction of human dignity. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded.

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43. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

44. 247 U.S. 251 (1918), *overruled*, *United States v. Darby*, 312 U.S. 100 (1941).

45. *United States v. Darby*, 312 U.S. 100 (1941).

It is, in other words, "cruel and unusual" punishment in violation of the eighth amendment.

This is an interpretation to which a majority of my fellow justices—not to mention, it would seem, a majority of my fellow countrymen—do not subscribe. Perhaps you find my adherence to it, and my recurrent publication of it, simply contrary, tiresome, or quixotic. Or perhaps you see in it a refusal to abide by the judicial principle of *stare decisis*, obedience to precedent. In my judgment, however, the unique interpretive role of the Supreme Court with respect to the Constitution demands some flexibility with respect to the call of *stare decisis*. Because we Justices of the United States Supreme Court are the last word on the meaning of the Constitution, our views must be subject to revision over time, or the Constitution falls captive to the anachronistic views of long-gone generations. Of course the judge should seek out the community's interpretation of the constitutional text. Yet, in my judgment, when a justice perceives an interpretation of the text to have departed so far from its essential meaning, that justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path.

This kind of dissent, in which a judge persists in articulating a minority view of the law in case after case presenting the same issue, seeks to do more than simply offer an alternative analysis—that could be done in a single dissent and does not require repetition. Rather, this type of dissent constitutes a statement by the judge as an individual: "Here I draw the line." Of course, as a member of a court, one's general duty is to acquiesce in the rulings of that court and to take up the battle behind the court's new barricades. But it would be a great mistake to confuse this unquestioned duty to obey and respect the law with an imagined obligation to subsume entirely one's own views of constitutional imperatives to the views of the majority. None of us, lawyer or layman, teacher or student in our society must ever feel that to express a conviction, honestly and sincerely maintained, is to violate some unwritten law of manners or decorum. We are a free and vital people because we not only allow, we encourage debate, and because we do not shut down communication as soon as a decision is reached. As law-abiders, we accept the conclusions of our decision-making bodies as binding, but we also know that our right to continue to challenge the wisdom of that result must be accepted by those who disagree with us. So we debate and discuss and contend and always we argue. If we are right, we generally prevail. The process enriches all of us, and it is available to, and employed by, individuals and groups representing all viewpoints and perspectives.

I hope that what I have said does not sound like too individualistic a justification of the dissent. No one has any duty simply to make noise. Rather, the obligation that all of us, as American citizens have, and that judges, as adjudicators, particularly feel, is to speak up when we are convinced that the fundamental law of our Constitution requires a given result. I cannot believe that this is a controversial statement. The right to dissent is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births.

Through dynamic interaction among members of the present Court and through dialogue across time with the future Court, we ensure the continuing contemporary relevance and hence vitality of the principles of our fundamental charter. Each justice must be an active participant, and, when necessary, must write separately to record his or her thinking. Writing, then, is not an egoistic act—it is duty. Saying, “listen to me, see it my way, change your mind,” is not self-indulgence—it is very hard work that we cannot shirk.